No. 17-55504

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GUILLERMO ROBLES,

Plaintiff-Appellant,

v.

DOMINOS PIZZA LLC,

Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California

MOTION OF NATIONAL FEDERATION OF THE BLIND, AMERICAN COUNCIL OF THE BLIND, AMERICAN FOUNDATION FOR THE BLIND, ASSOCIATION OF LATE DEAFENED ADULTS, CALIFORNIA COUNCIL OF THE BLIND, CALIFORNIA FOUNDATION FOR INDEPENDENT LIVING CENTERS, DISABILITY RIGHTS ADVOCATES, DISABILITY RIGHTS CALIFORNIA, DISABILITY RIGHTS EDUCATION & DEFENSE FUND, NATIONAL ASSOCIATION OF THE DEAF, NATIONAL DISABILITY RIGHTS NETWORK, NATIONAL FEDERATION OF THE BLIND OF CALIFORNIA, WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS, AND WORLD INSTITUTE ON DISABILITY FOR LEAVE TO PARTICIPATE AS *AMICI CURIAE* SUPPORTING PLAINTIFF-APPELLANT

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October 26, 2017

Pursuant to Federal Rule of Appellate Procedure 29(a)(3), the National Federation of the Blind, American Council of the Blind, American Foundation for the Blind, Association of Late Deafened Adults, California Council of the Blind, California Foundation for Independent Living Centers, Disability Rights Advocates, Disability Rights California, Disability Rights Education & Defense Fund, National Association of the Deaf, National Disability Rights Network, National Federation of the Blind of California, Washington Lawyers' Committee for Civil Rights and Urban Affairs, and World Institute on Disability respectfully move for leave to participate in this appeal as *amici curiae* supporting appellants. Appellants have consented to the participation of the *amici*, but the Appellee has declined to consent until it receives a copy of the proposed brief of *amici*.

Amici are national and California-based organizations that represent and/or advocate on behalf of individuals with disabilities.

The National Federation of the Blind ("NFB"), the oldest and largest national organization of blind persons, is a non-profit corporation headquartered in Baltimore, Maryland. It has affiliates in all 50 states, Washington, D.C., and Puerto Rico. NFB and its affiliates are recognized by the public, Congress, executive agencies of state and federal governments, and the courts as a collective and representative voice on behalf of blind Americans and their families. The ultimate

purpose of NFB is the complete integration of the blind into society on a basis of equality. This objective includes the removal of legal, economic, and social discrimination. As part of its mission and to achieve these goals, NFB has worked actively to ensure that the blind have an equal opportunity to access the internet and other emerging technology.

The American Council of the Blind ("ACB") is a national grassroots consumer organization representing Americans with vision loss. With 70 affiliates across the country, ACB is committed to securing equal access and opportunity for Americans who are blind and visually impaired. ACB recognizes the value the internet has made in expanding accessibility, and has worked with private and public partners over the decades to assure progress continues toward making the internet accessible to all.

As the pioneering nonprofit to which Helen Keller devoted much of her extraordinary life, **the American Foundation for the Blind ("AFB")**, for nearly a century, has been addressing the most critical barriers that needlessly interfere with the rights, needs, and tremendous potential of the more than 24.7 million American children, working-age adults, and seniors who are blind or visually impaired. As technology has evolved over this past quarter century since the ADA's enactment, AFB has been at the forefront of America's public policy discussion about the application of the ADA and other disability civil rights laws in the digital age. AFB

has a long and distinguished track record providing technical assistance to America's leading corporations and others demonstrating how readily and cost-effectively accessibility to the internet, mobile platforms, and the most commonly used technologies can be achieved.

The Association of Late Deafened Adults ("ALDA") is a nationwide organization that emphasizes connection, support and inclusion for people who are partially or completely deafened but function primarily in the world of aural communication. As an organization, it has advocated actively on behalf of its members to implement the benefits and protections of state and federal disability laws in matters including movie and live theaters and athletic facilities.

The California Council of the Blind, a California not-for-profit corporation, is the largest and oldest organization of Californians with vision loss, with a membership of approximately 1,500 persons. Recognizing that website accessibility is essential in the ability of Americans with vision impairments to live independently, the Council has advocated on the issue of web accessibility in a variety of private and public settings for more than two decades, having been a party to the first settlement agreement concerning web access signed with Bank of America in 2000.

The California Foundation for Independent Living Centers ("CFILC") is a statewide non-profit that works to increase access and equal opportunity for

people with disabilities by building the capacity of Independent Living Centers. Since 1982 CFILC has been serving its members through advocacy, organizing and public policy that increase independent living and self-determination for all people with disabilities.

Disability Rights Advocates ("DRA") is a non-profit public interest legal center that specializes in high impact civil rights litigation advocacy on behalf of persons with disabilities throughout the United States. DRA works to end discrimination in areas such as access to public accommodations, public services, education, and technology. With offices in Berkeley, California and New York City, DRA strives to protect and advance the civil rights of people with all types of disabilities on both local and national bases. Through its ongoing litigation, DRA has successfully challenged inaccessible websites including such sites as Target.com, Scribd, and San Francisco Federal Credit Union, resulting in firm commitments by these businesses to ensure their websites are accessible to persons with disabilities.

Disability Rights California ("DRC"), a non-profit legal advocacy organization established in 1978, is California's Protection & Advocacy system mandated under federal law to advance and defend the civil rights of people with all types of disabilities statewide. DRC works in partnership with people with disabilities to achieve a society that values all people and supports their rights to

dignity, equality of opportunity, choice and quality of life. DRC is well-versed in the access barriers that prevent people with disabilities from being integrated into the mainstream of society. Last year, DRC provided critical legal assistance on more than 25,000 matters to individuals with disabilities, many of whom requested assistance to overcome accessibility barriers due to inaccessible websites, places of public accommodation, and public services within their communities, despite longstanding federal and state accessibility requirements.

The Disability Rights Education & Defense Fund ("DREDF"), based in Berkeley, California, is a national nonprofit law and policy center dedicated to protecting and advancing the civil rights of people with disabilities. Founded in 1979 by people with disabilities and parents of children with disabilities, DREDF pursues its mission through education, advocacy and law reform efforts. DREDF is nationally recognized for its expertise in the interpretation of federal and California disability civil rights laws, including the statutes at issue in this matter. This includes expertise in the application of these statutes to technology such as websites.

The National Association of the Deaf ("NAD"), founded in 1880, is the oldest national civil rights organization in the United States, and is the country's premier organization of, by and for deaf and hard of hearing individuals. The mission of the NAD is to preserve, protect, and promote the civil, human, and

linguistic rights of 48 million deaf and hard of hearing individuals in the country. The NAD endeavors to achieve true equality for its constituents through systemic change in all aspects of society including full access to web based services.

The National Disability Rights Network ("NDRN") is the non-profit membership organization for the federally mandated Protection and Advocacy ("P&A") and Client Assistance Program ("CAP") agencies for individuals with disabilities. The P&A and CAP agencies were established by the United States Congress to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. There are P&As and CAPs in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Territories (American Samoa, Guam, Northern Mariana Islands, and the US Virgin Islands), and there is a P&A and CAP affiliated with the Native American Consortium which includes the Hopi, Navajo and San Juan Southern Piute Nations in the Four Corners region of the Southwest. Collectively, the P&A and CAP agencies are the largest provider of legally based advocacy services to people with disabilities in the United States.

The National Federation of the Blind of California ("NFB of California") is the California affiliate of the National Federation of the Blind. With about 400 members, the NFB of California works to ensure that blind

Californians can participate fully and equally in modern society, which includes access to the internet.

Founded in 1968, **the Washington Lawyers' Committee for Civil Rights and Urban Affairs** is a non-profit civil rights organization established to eradicate discrimination by enforcing civil rights laws through litigation. In furtherance of this mission, the Washington Lawyers' Committee's disability rights project strives to guarantee equal access to all aspects of society to persons within the disability community. More recently, the project has focused on equal access to technologies and services on behalf of blind individuals who use talking screen readers, including equal access to online businesses, kiosks, and mobile applications.

World Institute on Disability ("WID") is a disability policy and practice institute committed to full participation in the social and economic fiber of our communities by persons with disabilities. WID has been at the cutting edge of access to the internet and all it represents since its inception.

Each *amici* organization, therefore, has a significant interest in ensuring that individuals with disabilities have an equal opportunity to access the internet, including websites like that of Appellee Domino's Pizza. *Amici*'s brief will apprise the Court of the legal and social implications of the inaccessibility of websites to Americans with disabilities. The brief will also demonstrate that the district

court's due process and primary jurisdiction doctrine rulings in this case are not only legally incorrect, but would render Title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12181-12189, a hollow right incapable of enforcement in cases involving access to the internet and emerging technology. As organizations that represent and advocate for the right of individuals with disabilities to access the internet equally and engage in the full social and economic fabric of modern society, *amici* are deeply concerned about the repercussions of the district court's decision. Accordingly, *amici* respectfully request that the Court grant them leave to participate as *amici curiae*.

Respectfully submitted,

October 26, 2017

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amici curiae* National Federation of the Blind, American Council of the Blind, American Foundation for the Blind, Association of Late Deafened Adults, California Council of the Blind, California Foundation for Independent Living Centers, Disability Rights Advocates, Disability Rights California, Disability Rights Education & Defense Fund, National Association of the Deaf, National Disability Rights Network, National Federation of the Blind of California, Washington Lawyers' Committee for Civil Rights and Urban Affairs, and World Institute on Disability certify that *amici*, respectively, are not publicly held corporations, that *amici*, respectively, do not have a parent corporation, and that no publicly held corporation owns 10 percent or more of *amici*'s respective stock.

Dated: October 26, 2017

By: /s/ Jessica P. Weber
Jessica P. Weber
Attorney for *Amici*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

INTERESTS OF *AMICI*

Amici are disability rights groups committed to advancing individuals with disabilities' equal access to websites and other new technology. *See* Appendix A (describing relevant background of each *amicus*). *Amici* submit this brief because they are concerned that the district court's ruling threatens the ability of individuals with disabilities to enforce their federal civil right to use and enjoy the web-based programs and services of places of public accommodation.[1]

INTRODUCTION

The Internet has become a fundamental part of the daily experiences of the vast majority of Americans. The wide-scale adoption of this technology is staggering. According to statistics compiled by the International Telecommunication Union, the proportion of the United States public using the Internet went from 14% in 1995, to 87% in 2014[2] – amounting to more than 277

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[1] *Amici* hereby certify that no party's counsel authored the brief in whole or in part, no party or party's counsel contributed money intended to fund preparation or submission of this brief, and no person other than *amici* and their counsel contributed money intended to fund preparation or submission of the brief. *Amici* have moved for leave to file this brief.

[2] Pew Research Center, The Web at 25 in the U.S., at 4-5 (Feb. 27, 2014), *available at* http://www.pewinternet.org/2014/02/27/the-web-at-25-in-the-u-s/ (last visited August 23, 2017).

million people in the United States who were using the Internet.[3] The growth of Internet usage is rivaled only by the myriad ways in which users can harness the capabilities of the Internet for the betterment of their lives through education, employment, commerce, entertainment, and countless other pursuits.

As the NFB and other disability rights organizations explained to DOJ:

> In many ways, individuals with disabilities rely on Web content more so than their nondisabled peers because of inherent transportation, communication, and other barriers. A blind person does not have the same autonomy to drive to a covered entity's office as a sighted person. A deaf or hard of hearing person does not have the same opportunity to call a covered entity's office. A person with an intellectual disability does not have the same ability to interact independently with the staff at a covered entity's office. The 24-hour-a-day availability of information and transactions on covered entity websites and mobile apps provides a level of independence and convenience that cannot be replicated through any other means. That is why the number of Americans who rely on the Internet has increased year after year and why entities offer information and transactions through that unique medium.
>
> [T]he lack of accessibility to Web content relating to education and employment have far reaching effects on every other aspect of the lives of individuals with disabilities. Barriers to educational and employment opportunities online (of which there are many) stymie or altogether prohibit individuals with disabilities from gaining the earning power necessary to obtain all of the other benefits available to a truly independent American. Congress described this very issue in crafting its findings in support of the ADA: "the continuing existence of unfair and unnecessary discrimination and prejudice denies people

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[3] U.S. Census Bureau, Projections of the Size and Composition of the U.S. Population: 2014 to 2060, at 2 (U.S. population in 2014 was 318.7 million) https://www.census.gov/content/dam/Census/library/publications/2015/demo/p25-1143.pdf (last visited August 23, 2017).

> with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

Comment from disability rights organizations to DOJ Supplemental Advance Notice of Proposed Rulemaking "Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities," C RT Docket No 128, RIN 119 -AA65, https://nfb.org/ada-title-ii-internet-regulations-joint-sanprm-comments, Answer 57 (October 7, 2016) (citations omitted).

If a covered entity's web content is inaccessible, individuals with disabilities face increased time and effort, delay in access, reliance on third parties, and even outright denial of access. When encountering an inaccessible website:

> most individuals with disabilities will endeavor to access material on their own even if it requires an unreasonably greater amount of time or effort than required for nondisabled persons. Many individuals with disabilities will also seek assistance, either from an employee of a covered entity or a third party. It is not uncommon for the covered entity to refer the person back to the website or state that it is not his or her responsibility to help with the inaccessible request for information. In addition, a blind person would not wish to entrust a stranger, which may be the only option for some, with personal or financial information to submit a request or payment online when it is convenient for them.

Id., at Answer 67. Calling or traveling to an office is often not a possibility either because of transportation, communication, and other barriers, or because it is not convenient to do so, or because the entity will not accept in-person visits. *Id.*

Thus, inaccessible websites have a chilling effect on the full and equal participation of individuals with disabilities in modern society.

SUMMARY OF ARGUMENT

Title III of the Americans with Disabilities Act ("ADA" or "Title III"), 42 U.S.C. §§ 12181-12189, and its implementing regulations require places of public accommodation, such as Defendant Domino's Pizza, to provide individuals with disabilities an equal opportunity to use and enjoy their programs and services, including their web-based programs and services. In addition, Title III requires places of public accommodation to ensure all their communications are equally effective for persons with and without disabilities. Yet according to the district court, individuals with disabilities cannot enforce their civil rights until the United States Department of Justice issues additional regulations providing web-specific technical standards for achieving equality and effectiveness, even though the ultimate obligation would be unchanged.

The district court's dismissal sets a dangerous precedent that the equal rights of individuals with disabilities are unenforceable unless and until the federal government decides to issue specific regulations for each possible type of communication. Twenty-seven years after the ADA was enacted, neither the Due Process Clause nor the primary jurisdiction doctrine requires individuals with disabilities to wait indefinitely to enforce their existing rights. This Court should

correct the district court's erroneous decision and make clear that individuals with disabilities are entitled to enforce their right to access immediately, not at some speculative future date.

ARGUMENT

I. Complying with the ADA does not violate defendants' due process rights.

The district court correctly held that Defendant's website must comply with Title III of the ADA, *Robles v. Dominos Pizza LLC*, No. CV16-06599 SJO (SPx), 2017 WL 1330216, at *3 n.1 (C.D. Cal. Mar. 20, 2017), which requires public entities to ensure that all their communications with members of the public with disabilities are "effective." 28 C.F.R. §36.303(c). However, the district court wrongly stated that ordering compliance would violate Defendant's due process rights because the United States Department of Justice ("DOJ") has not issued regulations specifying a technical standard for conformance, *id.* at *5.[4] Undoubtedly, covered entities have "a due process right to fair notice of regulators' requirements." *Fortyune v. City of Lomita*, 766 F.3d 1098, 1105–06 (9th Cir. 2014) (citing *United States v. AMC Entm't, Inc.*, 549 F.3d 760, 768–70 (9th Cir.

[4] Although the district court dismissed Plaintiff's complaint "pursuant to the primary jurisdiction doctrine," *id.* at *8, it found "Defendant's due process challenge to be meritorious," *id.* at *5. Thus, while the court's due process holding may be dictum, because the decision centers on this conclusion, this Court should make clear that the district court's due process holding is erroneous.

2008)). Yet the Defendant here, as well as other entities with covered websites, have had such notice.

The text of the ADA makes clear that covered entities must provide "full and equal enjoyment of the[ir] goods, services, facilities, privileges, advantages, or accommodations" to people with disabilities, 42 U.S.C. §12182(a), and must "take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services," 42 U.S.C. §12182(b)(2)(A)(iii). In the context of communications, the DOJ has made clear that "full and equal enjoyment" requires "effective communication." 28 C.F.R. §36.303(c).

The law and its regulations do not exempt any particular type of communication from the "effectiveness" requirement. All types of communication are covered. Nor do the law and regulations purport to provide specific standards of effectiveness for every type of communication. Rather, whether a means of communication, such as sign language, Braille, or a website, is effective, is a standard that is fact-based and perfectly within the capability of a covered entity, or a judge or jury, to assess.

Websites are means of communication and the Title III regulations have specifically included "accessible electronic and information technology" as an

example of an auxiliary aid since 2010. 28 C.F.R. § 36.303(b)(1). The absence of an additional regulation specifying a technical standard for website accessibility does not alter the existing legal mandate or excuse compliance with the law. There is no conflict between application of the ADA in this context and due process rights.

A. Places of public accommodation have sufficient notice of their obligation to make their covered websites accessible to individuals with disabilities.

Defendant and other covered entities have had more than adequate notice of their obligation to offer individuals with disabilities an equal opportunity to access and enjoy their services and communications, including their websites. First, the need to ensure "full and equal enjoyment" of services, including the provision of "auxiliary aids and services" when necessary, is clear from the ADA's text. 42 U.S.C. § 12182(a). And DOJ's Title III implementing regulations provide a standard that all covered entities' communications must satisfy – namely, "effective communication." 28 C.F.R. § 36.303(c)(1). The DOJ is under no obligation to provide more detail in order for the regulatory standards of "equal" and "effective" to be enforceable.

Nothing in the statute or regulations exempts websites or any other method of communication from meeting the effective communication standard. Notably, this is not a case involving an online-only business or a website with no nexus to a

brick-and-mortar location. *Dominos.com* and the Domino's Mobile App are clearly services and methods of communication of a covered entity.

Second, this Court has made clear that "as a general matter, the lack of specific regulations cannot eliminate a statutory obligation." *Fortyune*, 766 F.3d at 1102; *see Kirola v. City & Cty. of San Francisco*, 860 F.3d 1164, 1180 (9th Cir. 2017); *Reich v. Mont. Sulphur & Chem. Co.*, 32 F.3d 440, 444–45 (9th Cir. 1994).[5] In *Fortyune*, the defendant argued that although existing Title II regulations broadly prohibited local governments from discriminating in their services, programs, or activities, because there was no regulation specifically addressing the provision of accessible on-street parking, requiring equal access to such parking would violate its due process rights. *Id.* at 1102. Rejecting that argument, this Court reasoned that while the existing regulation offered some flexibility in achieving access, "at bottom, the regulation mandates program accessibility for all normal governmental functions, including the provision of on-street public parking." *Id.* at 1103.

This Court further explained that the Title II regulations did not "suggest[] that when technical specifications do not exist for a particular type of facility, public entities have no accessibility obligations." *Id.* For example, "[r]ecognizing

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[5] Notably, the decision below makes no mention of either *Fortyune* or *Reich* (*Kirola* was decided after the decision below).

the broad reach of the ADA, [the Court] ha[s] held that Title II requires public entities to maintain accessible public sidewalks, notwithstanding the fact that no implementing regulations specifically addressed sidewalks." *Id.* at 1102 (citing *Barden v. City of Sacramento*, 292 F.3d 1073, 1076-78 (9th Cir. 2002)).

Similarly, this Court recently explained that even if there were no technical accessibility requirements for buildings and facilities under the ADA, "[p]ublic entities would not suddenly find themselves free to ignore access concerns when altering or building new rights-of-way, parks, and playgrounds." *Kirola*, 860 F.3d at 1180. Instead, the regulatory "readily accessible and usable standard" would still apply. *Id.* (quotation marks and alterations omitted). Although the court would have to apply this general standard in specific cases, "[g]iving content to general standards is foundational to the judicial function." *Id.* (citing *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

The DOJ's Advance Notice of Proposed Rulemaking ("ANPRM") on website accessibility, announced more than seven years ago and now on indefinite hold,[6] does not render compliance with existing legal obligations a due process

[6] The proposed Title III website regulations have been placed on the Inactive Actions list. *See* Current Unified Agenda of Regulatory and Deregulatory Actions, 2017 Inactive Actions List (RIN 1190-AA61), *available at* https://www.reginfo.gov/public/jsp/eAgenda/InactiveRINs_2017_Agenda_Update.pdf.

violation. *See ANPRM*, 75 Fed. Reg. 43,460-01. As DOJ explained in its ANPRM, it sought to provide technical standards for website accessibility to help provide individuals with disabilities "consistent access" to websites and to offer covered entities "clear guidance on what is required under the ADA." *ANPRM*, 75 Fed. Reg. at 43,464. Thus, the purpose was not to create a new legal requirement, but to help improve compliance with an existing mandate. *See Nat'l Ass'n of the Deaf v. Harvard Univ.*, No. 3:15-CV-30023-MGM, 2016 WL 3561622, at *18 (D. Mass. Feb. 9, 2016), report and recommendation adopted, No. CV 15-30023-MGM, 2016 WL 6540446 (D. Mass. Nov. 3, 2016) (explaining that "the impetus for the ANPRM was not because the DOJ viewed the ADA as not already mandating website accessibility for the disabled," but because "'the system of voluntary compliance has proved inadequate in providing Web site accessibility to individuals with disabilities'") (quoting *ANPRM*, 75 Fed. Reg. at 43,463-64).

The possibility that an agency may issue technical standards does not create a due process problem. In *Reich v. Montana Sulphur & Chemical Company*, this Court reasoned that although it was anticipated that the Secretary of Labor would promulgate specific standards for safe and healthy working conditions, these standards would only "amplify and augment" the existing statutory obligation to provide a safe workplace and would not "displace" it. 32 F.3d at 445; *cf. Or. Paralyzed Veterans of Am. v. Regal Cinemas, Inc.*, 339 F.3d 1126, 1132–33 (9th

Cir. 2003) (applying an existing ADA regulation and following DOJ's interpretation of that regulation, even though the Access Board was in the process of addressing the specific topic at issue through rulemaking).

Notably, other judges in the court below, in Title III website cases decided just months after the present case was dismissed, rejected defendants' due process challenges. *See Reed v. CVS*, Case No. CV 17-3877-MWF (SKX), 2017 WL 4457508, at *5, (C.D. Cal. Oct. 3, 2017); *Gorecki v. Hobby Lobby Stores, Inc.*, No. CV 17-1131-JFW(SKX), 2017 WL 2957736, at *5 (C.D. Cal. June 15, 2017). In *Reed*, the court explained:

> CVS' contention amounts to a request to refrain from enforcing business' obligations under the ADA until the DOJ promulgates what it deems to be specific enough guidelines, a requirement that would eviscerate the ADA. The DOJ's position that the ADA applies to websites being clear, it is no matter that the ADA and the DOJ fail to describe exactly how any given website must be made accessible to people with visual impairments. Indeed, this is often the case with the ADA's requirements, because the ADA and its implementing regulations are intended to give public accommodations maximum flexibility in meeting the statute's requirements. This flexibility is a feature, not a bug, and certainly not a violation of due process.

As the district court held in *Gorecki*, "[t]he lack of specific regulations [providing technical standards for website accessibility] does not eliminate [defendant's] obligation to comply with the ADA or excuse its failure to comply with the mandates of the ADA." 2017 WL 2957736, at *4; *cf. Andrews v. Blick Art Materials, LLC*, -- F. Supp. 3d --, No. 17-CV-767, 2017 WL 3278898, at *17-

18 (E.D.N.Y. Aug. 1, 2017) (rejecting due process challenge in Title III website case because the ADA's flexibility does not render it unconstitutionally ambiguous). The district court's determination otherwise in this case contravenes this Court's guidance to "construe the language of the ADA broadly to advance its remedial purpose." *Cohen v. City of Culver City*, 754 F.3d 690, 695 (9th Cir. 2014).

B. Using WCAG 2.0 as a remedial standard for ensuring effective communication and equal access is consistent with due process.

The district court incorrectly identified this as a case about requiring compliance with the Web Content Accessibility Guidelines ("WCAG") 2.0, as opposed to with the ADA's effective communication and equal access requirements. *See Robles*, 2017 WL 1330216, at *5 ("Plaintiff seeks to impose on all regulated persons and entities a requirement that they 'compl[y] with WCAG 2.0 Guidelines.'"). Plaintiff referred to WCAG 2.0 in his complaint, explaining that requiring compliance with WCAG as a remedial measure would provide Plaintiff with equal access to Defendant's website and stating that he, therefore, wanted the court to require compliance with WCAG 2.0 in issuing a permanent injunction, Compl. ¶¶ 36, 43. These allegations appear in the section of the complaint entitled "Factual Background." In the sections of the complaint stating the causes of action under the ADA and in the prayer for relief, Plaintiff does not refer to WCAG. Instead, Plaintiff alleges that Defendant has violated the ADA by

denying him "full and equal access to" the website and mobile application, Compl. ¶¶ 53, 57, and seeks injunctive relief enjoining Defendant from violating the ADA and requiring Defendant "to take the steps necessary to make [the website and mobile application] readily accessible to and usable by blind and visually-impaired individuals," Compl., Prayer, ¶¶ 2-5.

If Defendant's website and mobile app are found to be in violation of the applicable statutory and regulatory standards ("equal" access and "effective" communication), WCAG is an appropriately measurable and testable standard by which to establish a remedy. *Reed*, 2017 WL 4457508, at *4 (explaining that "whether or not CVS's digital offerings must comply with the Web Content Accessibility Guidelines, or any other set of noncompulsory guidelines, is a question of ***remedy***, not liability.")

WCAG 2.0 is an industry standard of accessibility for web content. W3C, *Web Content Accessibility Guidelines (WCAG) Overview*, https://www.w3.org/WAI/intro/wcag (last visited October 9, 2017). It was developed by a working group comprised of accessibility and technology experts from industry, academia, advocacy, and the public. *See* W3C, *Participants in the Accessibility Guidelines Working Group*, https://www.w3.org/2000/09/dbwg/details?group=35422&public=1 (last visited October 9, 2017). WCAG 2.0, released in 2008, provides twelve guidelines within

four principles. Each guideline has testable success criteria for levels A, AA, and/or AAA, which can be applied to any website.

For example, WCAG 2.0 provides "Principle 1: Perceivable - Information and user interface components must be presentable to users in ways they can perceive." Guideline 1.1 provides, "Text Alternatives: Provide text alternatives for any non-text content so that it can be changed into other forms people need, such as large print, braille, speech, symbols or simpler language." Success Criterion 1.1.1, regarding Non-text Content (such as photographs and other images), provides "All non-text content that is presented to the user has a text alternative that serves the equivalent purpose, except for the situations listed below. (Level A)." W3C, *Web Content Accessibility Guidelines (WCAG) 2.0*, https://www.w3.org/TR/WCAG20/ (last visited October 9, 2017).

Conformance to WCAG 2.0 Level A and AA is one means of achieving effective communication and equal access to a website. Accordingly, the federal government has incorporated WCAG 2.0 into the updated accessibility standards for its own technology under Section 508 of the Rehabilitation Act. 36 C.F.R. Pt. 1194; *see* U.S. Access Board, *About the Update of the Section 508 Standards and Section 255 Guidelines for Information and Communication Technology*, https://www.access-board.gov/guidelines-and-standards/communications-and-it/about-the-ict-refresh/overview-of-the-final-rule (last visited October 9, 2017).

The U.S. Department of Transportation has established WCAG 2.0 Level A and AA as the standard for accessibility for airline websites and kiosks. 14 C.F.R. Pts. 382, 399; 49 C.F.R. Pt. 27; *see Fact Sheet: Web Site and Kiosk Accessibility*, *available at* https://www.transportation.gov/sites/dot.gov/files/docs/11-04-13%20Accessible%20Kiosks%20Fact%20Sheet_0_0.pdf. And in more than 25 consent decrees and settlement agreements in which the United States has been a party, DOJ has required covered entities to adhere to WCAG 2.0 level AA to ensure compliance with the ADA.[7] Thus, using WCAG 2.0 as a guide for ensuring equal access and effective communication creates no due process problem.

C. *AMC Entertainment* does not require dismissal of this case.

In deciding that requiring Defendant to comply with the law would violate its due process rights, the district court relied heavily on *United States v. AMC Entertainment, Inc.* Although *AMC* also involved a due process challenge to a Title III claim, it is readily distinguishable from the case at hand.

In *AMC*, DOJ sought to enforce 28 C.F.R. Pt. 36, app. A, § 4.33.3 ("§ 4.33.3"), requiring movie theaters to provide "lines of sight comparable to those for members of the general public," which it interpreted as mandating

[7] A list of the U.S. Department of Justice's consent decrees and settlement agreements requiring compliance with WCAG 2.0 level AA under both Titles II and III of the ADA is provided in Appendix B.

provision of "comparable viewing angles to the screen." 549 F.3d at 763, 765. DOJ first announced its interpretation in a 1998 amicus brief and, in 1999, the Access Board announced that it was considering incorporating DOJ's "viewing angle" interpretation into a final rule, but, as of 2008, had failed to do so. *Id.* at 764-765. The district court in *AMC* held that the defendant's theaters failed to comply with § 4.33.3, awarded summary judgment to the government, and ordered robust remedial relief that required ninety-six multiplexes around the country, containing 1,993 auditoria, to modify their design and architecture to provide an equivalent viewing angle for wheelchair users. *Id.* at 762. This Court held that to the extent the injunction required modifications to multiplexes designed or built before the government first gave notice of its "viewing angle" interpretation, it violated the defendant's due process rights.

The district court's conclusion that *AMC* is "squarely on point," is misplaced. *Robles*, 2017 WL 1330216, at *5. First, the Court's due process concerns in *AMC* were motivated in part by the theater chain receiving "pre- and post-construction approval for their stadium-seating theaters from multiple states, whose own programs had been certified by the DOJ as 'meeting or exceeding' the federal requirements promulgated by the Access Board." *AMC*, 549 F.3d at 769 n.3. Here, however, there is no evidence that Defendant has had its website certified as accessible by any government entity. Nor is there any evidence that

Defendant's website was created before 1996, when DOJ made clear that the ADA applied to websites, or that Defendant's website has not been altered since then.

Second, § 4.33.3's "lines of sight" standard had proven to be ambiguous, with appellate courts split on its meaning. *AMC*, 549 F.3d at 764-767 (summarizing circuit split and noting that all courts agreed on the regulation's ambiguity). In light of this uncertainty, it was unfair to expect the defendant to have guessed which interpretation to follow. In the present case, however, there has been no similar ambiguity or split. An absence of specific technical guidance does not render the underlying standards of full and equal enjoyment and effective communication ambiguous or impossible to meet. *See, e.g.*, *Gorecki*, 2017 WL 2957736, at *6 (reasoning, in distinguishing *AMC*, that "DOJ's general website accessibility requirement is not ambiguous because the DOJ has not imposed any specific means by which entities must meet this requirement and [covered entities] are free to decide how to comply with the ADA").

Finally, this Court did not disturb the district court's finding of liability in *AMC*. *Id.* at 767 n.2. Instead, the due process holding concerned only the court's remedial relief. In explaining its due process concerns, this Court focused heavily on the evidence of how costly it would be for the defendant to retrofit its theaters. *Id.* at 767-68. In contrast, the present case was dismissed at the pleadings stage, before liability could even be established. If there were any due process concerns

in this case akin to those in *AMC*, which there are not, they would not surface until the Plaintiff prevailed on the merits and the court were considering the scope of injunctive relief. *AMC* provides no support for dismissal at the pleadings stage on due process grounds. *See Fortyune*, 766 F.3d at 1106 n.13 (explaining that "further consideration of the City's due process argument would be premature because due process constrains the remedies that may be imposed").

II. The district court inappropriately invoked the primary jurisdiction doctrine.

According to the district court, the primary jurisdiction doctrine bars individuals with disabilities from seeking equal access to websites unless and until DOJ completes a regulatory process to specify exactly how covered entities should meet their existing legal obligation to provide equally effective communication. *Robles*, 2017 WL 1330216, at *8. The district court's holding constitutes a dangerous misapplication of the primary jurisdiction doctrine that would leave individuals with disabilities with no recourse to enforce their existing rights at all for the foreseeable future.

The primary jurisdiction doctrine is a prudential, rather than jurisdictional, doctrine that "allows courts to stay proceedings or to dismiss a complaint without prejudice pending the resolution of an issue within the special competence of an administrative agency." *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008). Courts may invoke the doctrine when "a claim requires resolution of

an issue of first impression, or of a particularly complicated issue that Congress has committed to a regulatory agency." *GCB Commc'ns, Inc. v. U.S. S. Commc'ns, Inc.*, 650 F.3d 1257, 1264 (9th Cir. 2011) (internal quotation marks omitted). In general, the doctrine may apply where there is: "(1)[a] need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in administration." *Clark*, 523 F.3d at 1115 (internal quotation marks omitted).

This Court has emphasized that the doctrine "applies in a limited set of circumstances," *Clark*, 523 F.3d at 1114, and "does not require that all claims within an agency's purview be decided by the agency," *Brown v. MCI WorldCom Network Servs., Inc.*, 277 F.3d 1166, 1172 (9th Cir. 2002). Nor should courts use the primary jurisdiction doctrine to "secure expert advice for the courts from regulatory agencies every time a court is presented with an issue conceivably within the agency's ambit." *Id.* at 1172 (internal quotation marks omitted). "The deciding factor in determining whether the primary jurisdiction doctrine should apply is efficiency." *Reid v. Johnson & Johnson*, 780 F.3d 952, 967 (9th Cir. 2015) (internal quotation marks omitted). This Court reviews a district court's application of the primary jurisdiction doctrine *de novo*. *Int'l Bhd. of Teamsters,*

Chauffeurs Warehousemen & Helpers, General Truck Drivers, Office Food and Warehouse Local 952 v. Am. Delivery Serv. Co., Inc., 50 F.3d 770, 773 (9th Cir. 1995).

A. The issue in this case is not a complicated question of first impression.

Plaintiffs brought this case, in part, under Title III, seeking a "preliminary and permanent injunction requiring Defendant to take the steps necessary to make [its website] readily accessible to and usable by blind and visually-impaired individuals." (Compl. at 18.) Whether a defendant is required to make its website accessible to the blind is not a "question of first impression," nor is it "a particularly complicated issue that Congress has committed to a regulatory agency." *See GCB Commc'ns, Inc.*, 650 F.3d at 1264.

Rather, the central two questions for the court to resolve are: (1) whether Defendant fails to provide the blind with equally effective communication and/or an equal opportunity to use and enjoy its products and services through its website; and (2), if so, whether Defendant can establish either of the affirmative defenses of fundamental alteration or undue burden. *See* 28 C.F.R. §§ 36.201, 36.303. These are not complicated issues of first impression; instead, these are the sorts of questions courts regularly resolve in ADA cases.

Other courts rejecting dismissal under the primary jurisdiction doctrine in the context of applying the ADA to new technology have reasoned that referral to

DOJ would not be helpful or necessary in deciding the basic, fact-specific inquiries typical of ADA cases. *See Harvard Univ.*, 2016 WL 3561622, at *15 (explaining, in declining to apply primary jurisdiction doctrine, that "it is the function of the court to decide whether a particular defendant has violated the ADA's prohibition against disability-based discrimination," which includes analyzing the undue burden defense); *Arizona ex rel. Goddard v. Harkins Admin. Servs.*, No. CV-07-00703-PHX-ROS, 2011 WL 13202686, at *3 (D. Ariz. Feb. 8, 2011) (holding that referring the case to DOJ to await a final rule on captioning in movie theaters would "not resolve the question presented in this case: to what extent, if at all, the ADA . . . require[s] *these Defendants* install captioning and video description devices in *their* movie theaters" and "at what point, if at all, installing captioning and video description devices imposes an undue burden on *these Defendants*") (emphasis in original); *see also Andrews*, 2017 WL 3278898, at *16 ("Analyzing the text of the ADA and its regulations and deciding whether a business is in compliance with those laws is a task well within the competence of the judicial branch.").

Courts are perfectly capable of determining whether access is "equal" and whether communication is "effective." *See, e.g.*, *Hindel v. Husted*, No. 2:15-CV-3061, 2017 WL 432839, at *5 (S.D. Ohio Feb. 1, 2017) (finding, in Title II case, that defendant's website did not provide equal access "because it is not formatted

in a way that is accessible to all individuals, especially blind individuals like the Individual Plaintiffs whose screen access software cannot be used on the website"); *California Council of the Blind v. County of Alameda*, 985 F. Supp. 2d 1229, 1238-39 (N.D. Cal. 2013) (analyzing ADA effective communication claim); *Sengupta v. City of Monrovia*, 2010 WL 11515299, at *4 (C.D. Cal. 2010) (same); *Aikins v. St. Helena Hosp.*, 843 F. Supp. 1329, at 1335-36 (N.D. Cal. 1994) (same).

In fact, courts have interpreted the meaning of "equal" and "effective" in a variety of complex contexts. *See, e.g., Georgia v. Ashcroft*, 539 U.S. 461(2003) (addressing the meaning of "effective exercise of the electoral franchise"); *Strickland v. Washington*, 466 U.S. 668, 680 (1984) (interpreting the right to "counsel reasonably likely to render and rendering reasonably effective assistance given the totality of the circumstances."); *Biogen Idec Inc. v. GlaxoSmithKline LLC*, 2011 WL 4949042, at *11 (S.D. Cal. Oct. 18, 2011) ("[T]he term 'effective to treat the chronic lymphocytic leukemia' shall be construed as 'providing a positive clinical benefit to the chronic lymphocytic leukemia patient.'"); *Medicis Pharm. Corp. v. Acella Pharms. Inc.*, No. CV 10–1780, 2011 WL 810044, at *7 (D. Ariz. Mar. 2, 2011) ("So, the 'effective amount' is the quantity of dermatologically active ingredients that is adequate to produce the intended result.") Thus, the questions raised here are well within the court's competence to decide.

B. Referral to DOJ is not needed to obtain agency expertise or to ensure uniformity in administration.

The issues of whether a covered website provides equal and effective access and whether any affirmative defense applies do not require referral to DOJ for "expertise or uniformity in administration." *Clark*, 523 F.3d at 1115. DOJ regulations already provide the standards of "equal" access and "effective communication" and already list "accessible electronic and information technology" as auxiliary aids. Indeed, DOJ has found compliance with WCAG 2.0 Level AA to be an appropriate remedy in over 25 settlements. *See* App'x B. Thus, DOJ's well-known views on this issue obviate the need for referral. *Cf. Harvard Univ.*, 2016 WL 3561622, at *19 ("The DOJ's consistently stated position cannot be squared with the notion that, until DOJ issues specific regulations governing website accessibility, if it ever does, public accommodations such as Harvard may discriminate against the disabled in connection with the goods, services, facilities, privileges, accommodations, and advantages they offer via the internet.").

Moreover, the elements of an ADA claim are typically fact-specific (*i.e.*, how precisely the individual with a disability is denied equal access; whether the barriers identified by the plaintiff exist; for purposes of the undue burden analysis, the cost of remedying the discrimination compared to the covered entity's resources; and with respect to the fundamental alteration defense, the nature of the program, activity, or service at issue and how a modification may alter it). *See*,

e.g., *Pierce v. Cty. of Orange*, 526 F.3d 1190, 1217 (9th Cir. 2008) (noting that in ADA cases, "determining whether a modification or accommodation is reasonable always requires a fact-specific, context-specific inquiry"). The normal mechanisms of judicial review, including adherence to precedent and to the language of the statute, already function to ensure that these fact-specific inquiries are conducted uniformly, even though the facts and results will not be uniform.

In such cases where the result would be limited to the facts of the particular case, courts tend not to refer to the agency. *See Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, 778 F.2d 1365, 1370–71 (9th Cir. 1985) (declining to invoke the primary jurisdiction doctrine where the plaintiff argued that a tariff was "unreasonable as applied to the facts of this case" but did not challenge the tariff's facial reasonableness); *see also U.S. Pub. Int. Research Grp. v. Atl. Salmon of Me., LLC*, 339 F.3d 23, 34 (1st Cir. 2003) (explaining that "the necessary focus upon the actions of two particular companies" weighed against referral on primary jurisdiction grounds); *Heightened Indep. & Progress v. Port Auth. of New York and New Jersey*, No. 07-2982 (JAG), 2008 WL 5427891, at *5 (D.N.J. Dec. 30, 2008) (finding the issue of "whether elevators should have been installed at one particular PATH station" did not raise uniformity concerns requiring referral because "there is no broad implication for the overall ADA regulatory scheme.")

Nor does the risk that DOJ could change course and call for a less exacting standard than WCAG 2.0 level AA necessitate referral to DOJ. Requiring more of the defendant in this case "would not undermine the uniformity of DOJ's [potential future] regulatory interpretation." *Harvard Univ.*, 2016 WL 3561622, at *15; *accord Baykeeper v. NL Indus., Inc*., 660 F.3d 686, 691-92 (3d Cir. 2011) (noting that even if the court "orders remediation that imposes an additional burden on [the defendant], a more stringent remediation standard . . . is not a reason to invoke the primary jurisdiction doctrine") (internal quotation marks omitted); *Maine People's Alliance v. Holtrachem Mfg. Co., LLC*, No. Civ. 00-69-B-C, 2001 WL 1602046, at *8 (D. Me. Dec. 14, 2001) ("Extra burden is not what the [primary jurisdiction] doctrine is meant to circumvent; additional obligation is not incompatible with nor does it undermine the agency-driven process."). Furthermore, the ADA already protects defendants from imposition of a standard so exacting as to prove unduly burdensome. *See* 42 U.S.C. § 12182(b)(2)(A)(iii).

C. Referral to DOJ does not promote efficiency and would prejudice individuals with disabilities.

Efficiency, the "deciding factor in determining whether the primary jurisdiction doctrine should apply," *Reid v. Johnson & Johnson*, 780 F.3d 952, 967 (9th Cir. 2015), weighs heavily against dismissal on primary jurisdiction grounds. Although DOJ issued an ANPRM regarding Title III website regulations more than seven years ago, *ANPRM*, 75 Fed. Reg. 43,460-01, it has made no movement on

issuing new Title III regulations and has now placed its website regulations on the Inactive Actions list. *See* Current Unified Agenda of Regulatory and Deregulatory Actions, 2017 Inactive Actions List (RIN 1190-AA61), *available at* https://www.reginfo.gov/public/jsp/eAgenda/InactiveRINs_2017_Agenda_Update.pdf. Thus, no action can be expected in the foreseeable future.

Dismissal for referral to DOJ is therefore highly inefficient, particularly where the application of the ADA is well within the court's competence. *See Astiana v. Hain Celestrial Grp., Inc.*, 783 F.3d 753, 761 (9th Cir. 2015) (holding that "primary jurisdiction is not required when a referral to the agency would significantly postpone a ruling that a court is otherwise competent to make"); *Gorecki*, 2017 WL 2957736, at *7 (explaining that because DOJ "has not taken any further action towards promulgating specific accessibility requirements and there is no reason to believe the department will issue rules any time in the near future," the "potential for delay while the federal administrative rulemaking process proceeds is great" and weighs against invoking the primary jurisdiction doctrine).

Referral to DOJ in the face of agency inaction would be prejudicial to the plaintiff in this case, as well as to other individuals with disabilities seeking equal access to websites. The ADA, since 1990, has required places of public accommodation to offer services and goods to individuals with disabilities in an

equal manner. 42 U.S.C. § 12182. By dismissing website accessibility cases in the hope that, against all signs to the contrary, DOJ will act soon to specify a technical standard, courts would place the federal civil rights of individuals with disabilities on indefinite hold. *See Harvard Univ.*, 2016 WL 3561622, at *20 (explaining that because, if plaintiffs' Title III claims are valid, they "will continue to be unlawfully harmed until this case is resolved[,] . . . extending the period of time Plaintiffs must wait for a possible remedy through imposition of a stay would be prejudicial").

This is particularly so because DOJ does not offer an administrative hearing process with remedies; instead, individuals with disabilities can only seek a remedial order from the courts. *See Arizona ex rel. Goddard*, 2011 WL 13202686, at *3 (reasoning that because "DOJ does not have an administrative process in which these parties can directly participate to resolve their dispute," dismissal under the primary jurisdiction doctrine would be inappropriate) (*comparing Rosado v. Wyman*, 397 U.S. 397, 406 (1970) (refusing to apply primary jurisdiction doctrine where a Department of Health Education and Welfare "has no procedures whereby recipients may trigger and participate in the department's review of state welfare programs."), *and Reiter v. Cooper*, 507 U.S. 258, 268-69 (1993) (refusing to apply primary jurisdiction doctrine where defendants confused it with the doctrine of exhaustion of remedies, and "the [Interstate Commerce

Commission] has long interpreted its statute as giving it no power to decree reparations relief" as requested by the plaintiffs), *with N. Cnty. Commc'ns Corp. v. Cal. Catalog & Tech.*, 594 F.3d 1149, 1162 (9th Cir. 2010) (applying primary jurisdiction doctrine where statutory scheme required Federal Communications Commission to make determination before private right of action arose). The district court's application of the primary jurisdiction doctrine in this case was incorrect, inefficient, and prejudicial.

CONCLUSION

Because neither the Due Process Clause nor the primary jurisdiction doctrine requires individuals with disabilities to forfeit their federal civil right to full and equal enjoyment of covered entities' websites, this Court should reverse the district court's judgment and remand this case for appropriate further proceedings.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Because of the grave danger the district court's ruling poses to enforcement of the federal civil rights of individuals with disabilities, *amici* respectfully request oral argument on the present appeal and the opportunity to participate briefly in such argument.

CERTIFICATE OF COMPLIANCE

1. This brief contains 6,500 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word in Times New Roman 14-point font.

3. In making this certification, I have relied on the word count feature of the word-processing program used to prepare this brief.

/s/ Jessica P. Weber
Jessica P. Weber

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 26, 2017.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Jessica P. Weber
Jessica P. Weber

APPENDIX A

The National Federation of the Blind ("NFB"), the oldest and largest national organization of blind persons, is a non-profit corporation headquartered in Baltimore, Maryland. It has affiliates in all 50 states, Washington, D.C., and Puerto Rico. NFB and its affiliates are recognized by the public, Congress, executive agencies of state and federal governments, and the courts as a collective and representative voice on behalf of blind Americans and their families. The ultimate purpose of NFB is the complete integration of the blind into society on a basis of equality. This objective includes the removal of legal, economic, and social discrimination. As part of its mission and to achieve these goals, NFB has worked actively to ensure that the blind have an equal opportunity to access the internet and other emerging technology.

The American Council of the Blind ("ACB") is a national grassroots consumer organization representing Americans with vision loss. With 70 affiliates across the country, ACB is committed to securing equal access and opportunity for Americans who are blind and visually impaired. ACB recognizes the value the internet has made in expanding accessibility, and has worked with private and public partners over the decades to assure progress continues toward making the internet accessible to all.

As the pioneering nonprofit to which Helen Keller devoted much of her extraordinary life, **the American Foundation for the Blind ("AFB")**, for nearly a century, has been addressing the most critical barriers that needlessly interfere with the rights, needs, and tremendous potential of the more than 24.7 million American children, working-age adults, and seniors who are blind or visually impaired. As technology has evolved over this past quarter century since the ADA's enactment, AFB has been at the forefront of America's public policy discussion about the application of the ADA and other disability civil rights laws in the digital age. AFB has a long and distinguished track record providing technical assistance to America's leading corporations and others demonstrating how readily and cost-effectively accessibility to the internet, mobile platforms, and the most commonly used technologies can be achieved.

The Association of Late Deafened Adults ("ALDA") is a nationwide organization that emphasizes connection, support and inclusion for people who are partially or completely deafened but function primarily in the world of aural communication. As an organization, it has advocated actively on behalf of its members to implement the benefits and protections of state and federal disability laws in matters including movie and live theaters and athletic facilities.

The California Council of the Blind, a California not-for-profit corporation, is the largest and oldest organization of Californians with vision loss,

with a membership of approximately 1,500 persons. Recognizing that website accessibility is essential in the ability of Americans with vision impairments to live independently, the Council has advocated on the issue of web accessibility in a variety of private and public settings for more than two decades, having been a party to the first settlement agreement concerning web access signed with Bank of America in 2000.

The California Foundation for Independent Living Centers ("CFILC") is a statewide non-profit that works to increase access and equal opportunity for people with disabilities by building the capacity of Independent Living Centers. Since 1982 CFILC has been serving its members through advocacy, organizing and public policy that increase independent living and self-determination for all people with disabilities.

Disability Rights Advocates ("DRA") is a non-profit public interest legal center that specializes in high impact civil rights litigation advocacy on behalf of persons with disabilities throughout the United States. DRA works to end discrimination in areas such as access to public accommodations, public services, education, and technology. With offices in Berkeley, California and New York City, DRA strives to protect and advance the civil rights of people with all types of disabilities on both local and national bases. Through its ongoing litigation, DRA has successfully challenged inaccessible websites including such sites

as Target.com, Scribd, and San Francisco Federal Credit Union, resulting in firm commitments by these businesses to ensure their websites are accessible to persons with disabilities.

Disability Rights California ("DRC"), a non-profit legal advocacy organization established in 1978, is California's Protection & Advocacy system mandated under federal law to advance and defend the civil rights of people with all types of disabilities statewide. DRC works in partnership with people with disabilities to achieve a society that values all people and supports their rights to dignity, equality of opportunity, choice and quality of life. DRC is well-versed in the access barriers that prevent people with disabilities from being integrated into the mainstream of society. Last year, DRC provided critical legal assistance on more than 25,000 matters to individuals with disabilities, many of whom requested assistance to overcome accessibility barriers due to inaccessible websites, places of public accommodation, and public services within their communities, despite longstanding federal and state accessibility requirements.

The Disability Rights Education & Defense Fund ("DREDF"), based in Berkeley, California, is a national nonprofit law and policy center dedicated to protecting and advancing the civil rights of people with disabilities. Founded in 1979 by people with disabilities and parents of children with disabilities, DREDF pursues its mission through education, advocacy and law reform efforts. DREDF

is nationally recognized for its expertise in the interpretation of federal and California disability civil rights laws, including the statutes at issue in this matter. This includes expertise in the application of these statutes to technology such as websites.

The National Association of the Deaf ("NAD"), founded in 1880, is the oldest national civil rights organization in the United States, and is the country's premier organization of, by and for deaf and hard of hearing individuals. The mission of the NAD is to preserve, protect, and promote the civil, human, and linguistic rights of 48 million deaf and hard of hearing individuals in the country. The NAD endeavors to achieve true equality for its constituents through systemic change in all aspects of society including full access to web based services.

The National Disability Rights Network ("NDRN") is the non-profit membership organization for the federally mandated Protection and Advocacy ("P&A") and Client Assistance Program ("CAP") agencies for individuals with disabilities. The P&A and CAP agencies were established by the United States Congress to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. There are P&As and CAPs in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Territories (American Samoa, Guam, Northern Mariana Islands, and the US Virgin Islands), and there is a P&A and CAP affiliated with the Native American Consortium which includes

the Hopi, Navajo and San Juan Southern Piute Nations in the Four Corners region of the Southwest. Collectively, the P&A and CAP agencies are the largest provider of legally based advocacy services to people with disabilities in the United States.

The National Federation of the Blind of California ("NFB of California") is the California affiliate of the National Federation of the Blind. With about 400 members, the NFB of California works to ensure that blind Californians can participate fully and equally in modern society, which includes access to the internet.

Founded in 1968, **the Washington Lawyers' Committee for Civil Rights and Urban Affairs** is a non-profit civil rights organization established to eradicate discrimination by enforcing civil rights laws through litigation. In furtherance of this mission, the Washington Lawyers' Committee's disability rights project strives to guarantee equal access to all aspects of society to persons within the disability community. More recently, the project has focused on equal access to technologies and services on behalf of blind individuals who use talking screen readers, including equal access to online businesses, kiosks, and mobile applications.

World Institute on Disability ("WID") is a disability policy and practice institute committed to full participation in the social and economic fiber of our

communities by persons with disabilities. WID has been at the cutting edge of access to the internet and all it represents since its inception.

APPENDIX B

U.S. Department of Justice Consent Decrees and Settlement Agreements Requiring Compliance with WCAG 2.0 Level AA

Title II Cases:

Settlement Agreement Between the United States of America and Palm Beach County Supervisor of Elections, DJ Nos. 204-18-218 & 166-18-43 (Jan. 19, 2017), *available at* https://www.ada.gov/palm_beach_sa.html

Consent Decree, *Dudley v. Miami Univ.*, No. 1:14-cv-38 (Dec. 14, 2016), *available at* https://www.ada.gov/miami_university_cd.html

Consent Decree, *United States v. Humboldt County*, No. 1:16-cv-5139 (Sept. 13, 2016), *available at* https://www.ada.gov/humboldt_pca/humboldt_ca_cd.html

Settlement Agreement Between the United States of America and Byesville, Ohio, Guernsey County, DJ No. 204-58-220 (May 19, 2016), *available at* https://www.ada.gov/byesville_sa.html

Settlement Agreement Between the United States of America and McLennan County, Texas, DJ No. 204-76-199 (Nov. 16, 2015), *available at* https://www.ada.gov/mclennan_pca/mclennan_sa.html

Settlement Agreement Between the United States of America and Galveston County, Texas, DJ No. 204-74-343 (Sept. 28, 2015), *available at* https://www.ada.gov/galveston_tx_pca/galveston_tx_sa.html

Settlement Agreement Between the United States of America and San Juan County, New Mexico, DJ No. 204-49-86 (Sept. 28, 2015), *available at* https://www.ada.gov/san_juan_co_pca/san_juan_sa.html

Settlement Agreement Between the United States of America and the City of Cedar Rapids, Iowa, DJ No. 204-27-41 (Sept. 1, 2015), *available at* https://www.ada.gov/cedar_rapids_pca/cedar_rapids_sa.html

Settlement Agreement Between the United States of America and Roberson County, North Carolina, DJ No. 204-54-122 (July 29, 2015), *available at* https://www.ada.gov/robeson_co_pca/robeson_sa.html

Settlement Agreement Between the United States of America and Champaign County, Illinois, DJ No. 204-24-116 (July 20, 2015), *available at* https://www.ada.gov/champaign_pca/champaign_sa.html

Settlement Agreement Between the United States of America and Merced County, California, DJ No. 204-11E-383 (July 20, 2015), *available at* https://www.ada.gov/merced_co/merced_sa.html

Settlement Agreement Between the United States of America and Yakima County, Washington, DJ No. 204-82-269 (July 20, 2015), *available at* https://www.ada.gov/yakima_co_pca/yakima_sa.html

Settlement Agreement Between the United States of America and Pennington County, South Dakota, DJ No. 204-69-49 (June 1, 2015), *available at* https://www.ada.gov/pennington_co/pennington_sa.html

Settlement Agreement Between the United States of America and Chaves County, New Mexico, DJ No. 204-49-85 (May 12, 2015), *available at* https://www.ada.gov/chaves_county_pca/chaves_sa.html

Settlement Agreement Between the United States of America and the Village of Ruidoso, New Mexico, DJ No. 205-49-24 (May 5, 2015), *available at* https://www.ada.gov/ruidoso_sa.html

Settlement Agreement Between the United States of America and Nueces County, Texas, DJ No. 204-74-348 (Jan. 30, 2015), *available at* https://www.ada.gov/nueces_co_tx_pca/nueces_co_tx_sa.html

Settlement Agreement Between the United States of America and the Orange County Clerk of Courts, DJ No. 204-17M-440 (July 17, 2014), *available at* https://www.ada.gov/occ.htm

Settlement Agreement Between the United States of America and Blair County, Pennsylvania, DJ No. 204-64-153 (Feb. 25, 2014), *available at* https://www.ada.gov/blair-co.htm

Settlement Agreement Between the United States of America and Louisiana Tech University and the Board of Supervisors for the University of Louisiana System, DJ No. 204-33-116 (July 22, 2013), *available at* https://www.ada.gov/louisiana-tech.htm

Settlement Agreement Between the United States of America and Lumpkin County, Georgia, DJ No. 204-19-227 (undated), *available at* https://www.ada.gov/lumpkin_co_pca/lumpkin_sa.html

Settlement Agreement Between the United States of America and Madison County, New York, DJ No. 204-50-256 (undated), *available at* https://www.ada.gov/madison_co_ny_pca/madison_co_ny_sa.html

Title III Cases:

Consent Decree, *United States of America v. Greyhound Lines, Inc.*, No. 16-67-RGA (D. De. Feb. 10, 2016), *available at* https://www.ada.gov/greyhound/greyhound_cd.html

Settlement Agreement Between the United States of America and Carnival Corporation, DJ No. 202-17M-206 (July 23, 2015), *available at* https://www.ada.gov/carnival/carnival_sa.html

Settlement Agreement Between the United States of America and edX, Inc., DJ No. 202-36-255 (Apr. 2, 2015), http://www.ada.gov/edx_sa.htm

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